

**From:** Leon Brooks  
**To:** Microsoft ATR  
**Date:** 12/13/01 2:12am  
**Subject:** Comment on Proposed Microsoft Monopoly Settlement

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**CC:** president@whitehouse.gov@inetgw

A signed copy of the body of this email will be forwarded by surface mail via Renata Hesse, Trial Attorney with the Antitrust Division of the Department of Justice in Washington.

#### IDENTIFICATION

My name is Leon Brooks, I was born on the 30th day of August, 1962 in Merritt, British Columbia, Canada of Australian parents and have been a resident in Australia for the past 37 years. My current address is 5 Lisle Street, Mount Claremont (6010), Western Australia.

My usual email address is leon@cyberknights.com.au. I am a director of the Information Technology company Cyberknights Pty Ltd, which creates, modifies, repairs and administers computer software. I can be contacted by telephone (voice or SMS) on +61-409-655-359.

#### RELEVANCE

The decisions made in this case, although occurring within United States jurisdiction, will have a significant impact on computer practice, policy and law worldwide, including Australia and Canada.

In the course of my work in the computer industry I am called upon to work on programs and data run and stored on computers within the United States mainland (through remote access tools like OpenSecureShell and CVS).

I have had 21 years of experience in working with software, including proprietary software, including Microsoft products. I have lived through the events which led to Microsoft being convicted as a monopolist and had to deal with difficult situations created by those monopolising actions.

I have created and modified (and continue to create and modify) both proprietary and various forms of Open Source software, including software licenced under the Free Software Foundation's GPL and software licenced under other Open styles of licence such as those termed ``BSD-like'' and ``freeware.''

#### === COMMENT ON SETTLEMENT PROPOSAL ===

##### PROBLEMS WITH EXISTING PROPOSAL

1. The educational domain is one of the few computer-user areas not yet completely dominated by the monopolist, and the proposed monopoly settlement, prima facie, simply gives government sanction to the monopolist overwhelming their major proprietary competitor, Apple Computer Corporation, by extending the monopoly products into this area.
2. The proposed settlement would also allow the monopolist to enjoy the fruits of its illegal labours, give it enormous tax breaks, and allow it to be claiming to do genuinely good, charitable and useful things when the nett effect of the proposed remedy would actually be a financial benefit to the monopolist. Even without the tax breaks and direct monopolising effects, consequential sales of other monopoly software would more than pay for the ``donation.''
3. The amount of the donation is insignificant. The monopolist currently has \_cash\_ holdings valued at in excess of thirty times the amount being considered in the remedy. To put this in context, if your gross income is USD \$200,000.00 per annum and you have USD \$1,000,000.00 cash in the bank plus USD \$1,000,000,000.00 in other assets, will a once-off tax-deductible fine of USD \$18,000.00 deter you from practices which increase your income by an extra 8% (USD \$16,000 in round 1) per annum?
4. The enforcement measures are insignificant and have no timely and powerful backing. The monopolist all but ignored the last set of antitrust measures imposed on it. In order to get the monopolist to obey any rulings not staggeringly favourable to it, there will need to be

stiff, clear and specific non-compliance penalty clauses in place from the start, backed and adjudicated by people willing to actually apply them.

5. No provision has been made for reimbursement of damages to any of the plaintiffs.

Far from being a penalty or a remedy of any kind, it is (fancy words aside) effectively a direct sanction for and encouragement of monopoly. The English terms for this kind of remedy are all long-winded, but the Jews have a single word ``chutzpah'' (or ``hutzpah'' in some dialects) to describe it.

I should not like to have my name associated with its implementation at all, let alone published for posterity in the Federal Register and spread across cover stories in legal and computer-related media around the world.

#### FAVOURABLE POINTS IN EXISTING PROPOSAL

1. It ends the current round of these legal proceedings quickly.

#### IMPORTANT ISSUES NOT ADDRESSED BY THE PROPOSAL

1. The National Security implications of having the vast majority of users working through a single software set, particularly a set with a highly disproportionate number of ongoing security issues, have not been addressed.

2. The financial and military risks of having a significant percentage of the nation's capital dependent upon or running through a single corporate entity have not been addressed. Consider a heavily industrialised nation that loses most of its computing power (data access) through a custom-written Windows virus or a bomb at MSN just as another WTC-sized terrorist event gets underway, or another stock-market crash begins.

3. The stability of a nation which allows so many resources to be tied up in what amounts to a single privately controlled business entity has not been addressed.

4. The remedy fails to address or even hint at the contributions of key people behind the deliberate and strategic monopolisation. To be fair and just, the remedy should include significant penalties for the individuals responsible for directing it during its establishment and ongoing maintenance.

#### OTHER CONSIDERATIONS

Many individuals have lost their entire livelihood through the monopolistic actions of the defendant, and have not been represented in the proceedings simply because they cannot afford to. This should be borne in mind when framing the nature and size of penalties.

Many other individuals have been so frustrated and demoralised by the monopolistic actions of the defendant that sheer accumulated pessimism has prevented them from bringing suit.

Such an accumulation of wealth (approaching \$1 trillion if all companies involved are considered together with personal fortunes) must have come from somewhere. Unless it can be shown that the defendant alone provided more than this value in services to the communities from which this fortune came, the difference represents a loss to those communities and must be reimbursed to them.

#### IMPROVEMENTS TO THE PROPOSED SETTLEMENT

It is not easy to apply any sensible amendment to the existing proposal

which will address more than one or two of the many issues still unresolved. It would be simpler and more just to discard it and build a very simple proposal to replace it.

The purpose of a monopoly is to achieve control, and through that control to acquire assets. Therefore the ideal remedy is to remove control and assets from the monopolist since this directly contradicts their reasons for deliberately constructing a monopoly.

In this case, the monopolist is a company which cannot think for itself, a company which is directed by owners and managers, so it would be most appropriate if the remedy included those managers.

#### === A N A L T E R N A T I V E P R O P O S A L ===

##### ASSET REMEDY

That Microsoft pay a fine of 10% of their nett worth, 20% of which is due and payable on the day of imposition and the balance at 3% of the initial value [note 1] on the first day of each succeeding calendar month until the balance is paid, into a fund.

The penalty fund will be managed by people and organisations with no personal or corporate ties [note 2] with Microsoft, or with any of their first and second-level managers. This fund may then be drawn upon by the existing plaintiffs in the value of half of their proven claims, and any remaining monies are to be allocated to registered charitable organisations on application, such organisations to have no personal or corporate relationship to Microsoft or any first or second level Microsoft managers, and applications to be limited to one per financial year and in amounts less than the minimum of \$10 million or the organisation's previous financial year's gross income not including previous applications, or \$100,000 if this is their first year of operation.

Each first-level Microsoft manager (e.g. Bill Gates, Steve Ballmer) pay a fine of 20% of any monies or shares granted to them by Microsoft and related companies or people, shares to be valued at the start of the day of imposition or if already sold or traded then at their sale or traded value. Terms of payment as for Microsoft.

Any second-level Microsoft manager (ie anyone who has reported directly to a first-level manager) pay a fine of 10% assessed as above.

The penalty for failure to promptly comply would in the first instance be a doubling of the amount not being complied with, due and payable immediately, and 2% per month interest on outstanding balances; and in the second instance the immediate bailiff/sheriff-supervised liquidation of randomly chosen corporate assets until the then-due amount is met [note 3].

##### CONTROL REMEDY

Microsoft, together with any company ever owned or controlled by it, or by its first- or second-level managers, to promptly (ie completed within a year) publish [note 1] detailed specifications for all of its data file formats, software and hardware APIs and networking protocols, together with dual GPL and BSD-licensed [note 2] working software examples in source and not dependent on proprietary code or development tools [note 3].

Microsoft to continue to so publish for ten years any new or altered file format, software/hardware API or networking protocol BEFORE the file format, software/hardware API or networking protocol is used (including for beta testing, giveaways, lease, hire, sale or similar arrangement) by people other than Microsoft employees or contractors.

Complete source code and documentation for any product no longer

supported must be promptly published under a GPL licence [note 4], by the end of 2002 for products already unsupported and before support is withdrawn for any product still supported on day of imposition.

The penalty for non-compliance would in the first instance be the immediate recall of all related products until one month after correct publication was made, and in the second instance a fine of one billion dollars for each product in violation, due and payable immediately with further penalties as above.

#### EXPLANATORY NOTES ON PROPOSED ASSET REMEDY

1. The penalty is stiff, but will surely be legally mitigated by Microsoft, and represents only a small fraction of the real damages. It directly addresses a motivation for creating and exting a monopoly. It also acts directly to temporarily limit the growth of the monopolist. Such a limit will assist alternative technologies in having a fair chance at establishing themselves in the marketplace.

2. To help in avoiding the inevitable efforts to circumvent the remedy.

3. A less direct penalty would invite legal haggling; lesser penalties have proven to be ineffective in past actions.

#### EXPLANATORY NOTES ON PROPOSED CONTROL REMEDY

1. Publish as in, make freely available. A USD \$10,000.00 fee for a paper manual set represents a serious investment for a very small company, an individual, or even a quite large company in a country with USD \$20-a-month average wage. Publishing the specifications in unadorned standard HTML illustrated with standard PNG images on a freely accessible website would be suitable.

2. The BSD-style licences permits incorporation into proprietary products, without which the remedy would not be as useful to producers of proprietary software. The GPL licence permits incorporation into the growing Free (Libre) Software base and offers protection against legal trickery in a Microsoft-amended BSD-style licence. Microsoft use BSD-style licenced software in their own products. The website at <http://www.opensource.org/> has examples of these licences available.

3. Dependence on tools or libraries for which a developer must obtain a possibly exclusive licence and/or pay a substantial fee to use would be an effective barrier to competition from individuals or nations in impoverished locations.

4. GPL is singularly appropriate here because it makes the code maintainable by third parties including the users themselves, but (legally at least) prevents entrepreneurs from rebranding, recompiling and marketing entire product lines in competition with Microsoft as if they had invented them.

#### SUMMARY

The remedy which I propose here is crude and almost certainly unworkable even when phrased in careful legalese, but I believe it represents a necessary starting point, and when suitably diluted by negotiations may result in a workable solution which does address concerns about not only direct monopolisation but also the risk to the American nation and consequently the world of letting so many eggs collect in one corporate basket.

Thank you for giving due consideration to this comment on the case.

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Leon Brooks

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